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The Supreme Court 1995 Term: FOREWORD: LEAVING THINGS UNDECIDED

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SUMMARY:
... v. FCC, 116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring). ... In an important sense, this is precisely the kind of democracy-forcing minimalism that I mean to endorse here. ... But courts can also use minimalism to provide spurs and prods so as to promote democratic deliberation itself. ... Romer stands for the proposition that any discrimination against homosexuals must rest on a public-regarding justification; the goal of preventing or delegitimating homosexual behavior is not by itself sufficient to support discrimination. ... Our narrow conclusion today is that when the state discriminates against homosexuals, the Equal Protection Clause requires that the discrimination must be rational in the sense that it must be connected with a legitimate public purpose, rather than fear and prejudice or a bare desire to state public opposition to homosexuality as such. ... Does Romer v. Evans have implications for the current debate over same-sex marriage? Should courts pursue a minimalist path? As a practical matter, it is surely more likely that the Court would overrule Hardwick than that it would take the dramatic (and maximalist) step of saying that same-sex marriages must be allowed under the Equal Protection Clause. ...

TEXT:
[*6]

We know too little to risk the finality of precision ....

Denver Area Educational Telecommunications Consortium, Inc. v. FCC,
116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring).

Because we need go no further, I would not here undertake the question whether

the test we have employed since Central Hudson should be displaced.

44 Liquormart, Inc. v. Rhode Island,
116 S. Ct. 1495, 1522 (1996)
(O'Connor, J., concurring in the judgment).

This Court has begun to make a habit of disclaiming the natural and foreseeable jurisprudential consequences of its pathbreaking (i.e., Constitution-making) opinions. Each major step in the abridgment of the people's right to govern themselves is portrayed as extremely limited or indeed sui juris .... The people should not be deceived.

Board of County Commissioners v. Umbehr,
116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting).

The case most relevant to the issue before us today is not even mentioned ....

Romer v. Evans, 116 S. Ct. 1620,
1631 (1996) (Scalia, J., dissenting).

I. Decisional Minimalism

Frequently judges decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome. n1

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n1. Of course there can be disagreement about how much it is necessary to say; some maximalists think that it is necessary to say a good deal. For the moment I bracket that point and rest content with ordinary intuitions.

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We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, [*7] as "decisional minimalism." n2 One of my principal goals in this Foreword is to explain the uses of minimalism by the Supreme Court and to explore the circumstances under which minimalism is justified. I do so by pointing to the importance of reducing the costs of decision and the costs of mistake and also by examining the relationship between judicial minimalism and democratic deliberation. Thus minimalism can be evaluated by attending to such factors as the need for private and public planning, the costs of decision, and the costs of error. I hope in the process to illuminate a range of old ideas: courts should not decide issues unnecessary to the resolution of a case; courts should deny certiorari in areas that are not "ripe" for decision; courts should avoid deciding constitutional questions; courts should respect their own precedents; courts should, in certain cases, investigate the actual rather than hypothetical purpose of statutes; courts should not issue advisory opinions; courts should follow prior holdings

but not necessarily prior dicta; courts should exercise the passive virtues associated with doctrines involving justiciability.

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n2. This is a rough, preliminary definition. Complexities are discussed below in Part II. Of course minimalists do not endorse opinions that are obscure or obfuscating, or that reflect deliberate coyness. Minimalists enthusiastically respect the obligation to offer reasons; they attempt to offer reasons of an unambitious kind.

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All of these ideas involve the constructive uses of silence. Judges often use silence for pragmatic or strategic reasons or to promote democratic goals. Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it.

I offer two large suggestions about a minimalist path. The first suggestion is that minimalism can be democracy-forcing, not only in the sense that it leaves issues open for democratic deliberation, n3 but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors. Sometimes courts say that Congress, rather than the executive branch, must make particular decisions; sometimes courts are careful to ensure that legitimate reasons actually underlie challenged enactments. In so doing, courts are minimalist in the sense that they leave open the most fundamental and difficult constitutional questions; they also attempt to promote democratic accountability and democratic deliberation. I am thus suggesting a form of [*8] minimalism that is self-consciously connected with the liberal principle of legitimacy. n4

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n3. Democratic deliberation should not be identified with simple majoritarianism. Reliance on democracy, for purposes of an understanding of constitutional law, must specify the relevant conception of democracy, and not rely on the word itself. See Ronald Dworkin, Freedom's Law 15-19 (1996). On the deliberative conception of democracy, consult, for example, Amy Gutmann & Dennis Thompson, Democracy and Disagreement 1 (1996); J<um u>rgen Habermas, Between Facts and Norms 274-86, 30428 (William Rehg trans., 1996) (1992); Cass R. Sunstein, The Partial Constitution 17-39, 123-61 (1993); Joshua Cohen, Deliberation and Democratic Legitimacy, in The Good Polity 17, 17 (Alan Hamlin & Philip Pettit eds., 1989).

n4. See generally Gutmann & Thompson, supra note 3, at 52-94 (discussing "deliberative reciprocity"); John Rawls, Political Liberalism 137 (2d ed. 1996) (discussing the liberal principle of legitimacy).

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As we will see, democratic ideas associated with minimalism help explain many ideas in the cases. Consider, for example, the void-for-vagueness and nondelegation doctrines; the requirement that Congress issue a "clear statement" in order to bring about certain results; rationality review under the Due Process and Equal Protection Clauses; the requirement that certain laws be

defended by reference to their "actual" rather than hypothetical purpose; the (largely implicit but still vibrant) doctrine of desuetude, banning enforcement of anachronistic law. All of these doctrines are connected with the basic foundations of the system of deliberative democracy. n5 They serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain.

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n5. Also consult Robert Burt, The Constitution in Conflict 19 (1994), which similarly sees courts as part of a process of dialogue among branches and expresses wariness about judicial foreclosure.

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My second suggestion is that a minimalist path usually - not always, but usually - makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise). The complexity may result from a lack of information, from changing circumstances, or from (legally relevant n6) moral uncertainty. In such cases, minimalism makes sense first because courts may resolve the relevant issues incorrectly, and second because courts may be ineffective or create serious problems even if their answers are right. Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so. n7

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n6. Some moral considerations are a legitimate part of constitutional argument and others are not. By "legally relevant" I mean to refer only to the former.

n7. On economizing on moral disagreement, consult Gutmann & Thompson, supra note 3, at 84-85: "Citizens should seek the rationale that minimizes rejection of the position they oppose....This form of magnanimity tells citizens to avoid unnecessary conflict in characterizing the moral grounds or drawing out the policy implications of their positions."

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The two points can be linked by the suggestion that courts should adopt forms of minimalism that can improve and fortify democratic processes. n8 Many rules of constitutional law attempt to promote polit- [*9] ical accountability and political deliberation. Minimalism need not be democracy-forcing by its nature; but it is most interesting when it promises to enhance accountability and deliberation in this way.

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n8. Professor Michelman's famous The Supreme Court, 1985 Term - Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986), is also concerned with deliberative democracy. Michelman urges that a self-consciously deliberative Supreme Court can "model" (and perhaps promote) a society with republican virtues. See id. at 16-17. The foundations of this Foreword - in deliberative democracy - are very close to the foundations of Michelman's. And it is

possible that on certain assumptions about the likely nature of various institutions, Michelman's view is correct. I am suggesting a more modest and cautious judicial role, one focused on promoting legislative deliberation, perhaps because of different assessments of the likely capacities of different institutions, and because of a belief that self-government, as Michelman understands it, coexists uneasily with the role for the Court that he appears to envisage.

There is also an obvious connection between what I am saying here and what is said in Alexander M. Bickel, The Least Dangerous Branch (1962). Here are some points of commonality: appreciation of passive virtues, endorsement of the doctrine of desuetude for the "privacy" cases, and an insistence on the need for the Court to think strategically and pragmatically about whether the nation is ready for the principles that the Court favors. But there are important differences as well. My argument finds its foundations in the aspiration to deliberative democracy, with an insistence that the principal vehicle is the legislature, not the judiciary; the judiciary is to play a catalytic and supplementary role. For Bickel, the Court was the basic repository of principle in American government; because of its insulation, it was the central deliberative institution. See id. at 30-50, 200-207. In addition, Bickel's belief in "prudence" was based on a generalized fear of political backlash, and not on social scientific evidence. We now know that it may be counterproductive for the Court to insist on social reform even if the Court is right. See, e.g., Gerald N. Rosenberg, The Hollow Hope 107-56 (1991). In his conception of the division of labor between courts and legislatures and in his absence of attention to empirical issues, Bickel is in his own way under the influence of the Warren Court. In brief, my treatment is more skeptical of judges and less so of majoritarian institutions. It is also in a sense more prudential and strategic (for better or for worse): Bickel was focussed on the decline of jurisdiction, with the apparent thought that, once assumed, jurisdiction should result in the most principled and full of opinions. See Bickel, supra, at 130, 235-43. I am suggesting that opinions should be self-consciously narrow and shallow, at least some of the time.

Finally, there is an evident resemblance betwen what is said here and what is suggested in Guido Calabresi, The Supreme Court, 1990 Term - Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80, 80-86 (1991). See Guido Calabresi, A Common Law for the Age of Statutes 4 (1982).

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I apply these ideas to a number of issues of current controversy. I suggest that the Court took a reasonable route in the most controversial and highly publicized case of last Term, Romer v. Evans. n9 The Court's puzzling and opaque opinion is not satisfying from the theoretical point of view; but this is not the only possible point of view. Romer combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of law's expressive function. Thus understood, Romer was a masterful stroke - an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open. Thus Romer provides an especially fruitful case for an exploration of the uses of minimalism.

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n9. 116 S. Ct. 1620 (1996).

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I compare Romer with United States v. Virginia, n10 in which the Court invalidated the operation of a single-sex military college. United States v. Virginia contains a number of ambitious pronouncements about sex equality and produced a self-conscious shift in the applicable standard of review. But the decision was nonetheless minimalist in two ways. First, it addressed not single-sex education in general, but [*10] single-sex education in the distinctive circumstances of Virginia Military Institute (VMI). Second, the Court found that Virginia did not establish or maintain VMI to diversify educational opportunities within the state, and in that sense the Court emphasized the absence of an actual purpose of promoting diversity and equality of opportunity. Because it stresses that sex discrimination at VMI is connected with second-class citizenship for women, United States v. Virginia is a natural sibling to Romer v. Evans. Both cases show a willingness to look behind enactments in order to see if they rest on constitutionally unacceptable "animus."

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n10. 116 S. Ct. 2264 (1996).

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More briefly, I discuss several cases from the 1995 Term that raise questions about how much to say and how much to leave open. I suggest that a majority of the Justices erred in reaching broad new conclusions about the First Amendment in 44 Liquormart, Inc. v. Rhode Island, n11 a major case involving the regulation of commercial advertisements. I endorse a surprising and tentative decision in which the Court - for the first time in its history - struck down an award of punitive damages. n12 I suggest that the unanimous Supreme Court was probably wrong to uphold the imposition of the death penalty on the basis of an open-ended grant of power from Congress to the President. n13 In several places I indicate that the Court acted reasonably in offering a narrow rather than broad judgment about Congress's power to regulate speech in the emerging communications media. n14 What is important, however, is not the particular conclusions, but the uses of minimalism in all these contexts.

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n11. 116 S. Ct. 1495 (1996).

n12. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996).

n13. See Loving v. United States, 116 S. Ct. 1737, 1751 (1996).

n14. See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2381 (1996).

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I conclude by exploring three large issues for the future: affirmative action, the right to die, and same-sex marriages. These areas are the focus of intense political debate and in that sense are especially promising areas for minimalism. Thus I urge that the Court should continue Justice Powell's narrow, fact-specific approach in the area of affirmative action; n15 that in cases involving the right to die, courts shall not invoke a still-new and highly abstract "right to privacy;" and that the Court should, in the near future, stay away from the issue of same-sex marriage, whatever it may think about the merits of the underlying constitutional claims. It should leave that issue undecided.

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n15. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315-20 (1978) (opinion of Powell, J.).

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II. Basic Concepts

While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as over- [*11] broad or as unconstitutional in all applications, it does provide a prudential reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute.

Colorado Republican Federal Campaign Committee v. Federal Election Commission,
116 S. Ct. 2309, 2320 (1996).

I think that the Buckley framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it ....

Colorado Republican Federal Campaign Committee v. Federal Election Commission,
116 S. Ct. 2309, 2328 (1996)
(Thomas, J., concurring in the judgment in part and dissenting in part).

A. Theories

What is the relationship among the Supreme Court, the Constitution, and those whose acts are subject to constitutional attack? It is easy to identify some theoretically ambitious responses. Perhaps the simplest one is originalist. n16 On this view, the Court's role is to invoke an actual historical judgment made by those who ratified the Constitution. The Dred Scott n17 case is a vigorous early statement of this approach. n18 Justices Scalia and Thomas have been enthusiasts for originalism, at least most of the time. n19 Here the Court tries to bracket questions of politics and morality and embarks on a historical quest.

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n16. The most well-known defense of originalism is Robert H. Bork, The Tempting of America (1990).

n17. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

n18. See Christopher L. Eisgruber, Dred Again: Originalism's Forgotten Past, 10 Const. Commentary 37, 46-54 (1993).

n19. See generally MacIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring in the judgment) (urging an originalist interpretation of the First Amendment); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989) (preferring the originalist to the nonoriginalist approach to interpretation). Both make exceptions for certain areas of law. For Justice Thomas, commercial speech clearly merits an exception. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (Thomas, J., concurring in part and concurring in the judgment). Affirmative action and campaign finance laws are exceptions for both. See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2323 (1996) (Thomas, J., dissenting in part, and concurring in the judgment); Shaw v. Hunt, 116 S. Ct. 1894 (1996); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101, 2118 (1995).

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The second response stems from the perceived need for judicial deference to plausible judgments from the executive and legislative branches of government. On this view, courts should uphold such judgments unless those judgments are outlandish or clearly mistaken. James Bradley Thayer's great article, advocating a rule of clear mis- [*12] take, is the classic statement of this position. n20 The position can be found as well in the writings of Justice Holmes, n21 the first Justice Harlan, n22 Justice Frankfurter, n23 and, most recently, Chief Justice Rehnquist. n24 Innumerable post-New Deal cases involving social and economic regulation have roots in Thayer. n25

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n20. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 139-52 (1893).

n21. See, e.g., Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

n22. See id. at 65 (Harlan, J., dissenting).

n23. See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597-98 (1940).

n24. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

n25. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-43 (1984) (discussing the need for judicial deference to the legislature's determination of "public use" and the proper approach to achieving the legislature's purpose); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175-76 (1980)

(refusing to strike down legislation under the Equal Protection Clause when the legislation is simply "unwise" or "unartfully" drafted); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (observing that the Court will not find a Due Process violation merely because a law is unwise).

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The third response is that the Supreme Court should make independent interpretive judgments about constitutional meaning, based not on historical understandings, but instead on the Court's own view of what interpretation makes best sense of the relevant provision. n26 When the Court struck down maximum hour and minimum wage legislation in the early part of the twentieth century, it spoke in these terms. n27 It did the same thing when it created and vindicated a "right of privacy," n28 as well as when it struck down bans on commercial advertising and restrictions on campaign spending. n29 Ronald Dworkin - Thayer's polar opposite in the American legal culture - is the most prominent advocate of this approach to constitutional law insofar [*13] as he stresses the value of integrity, which calls for principled consistency across cases. n30

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n26. See generally Dworkin, supra note 3, at 3 (discussing the Court's "moral reading" of the Constitution). There are many complexities in Dworkin's position and I do not claim that this thumbnail sketch is adequate to those complexities. An interesting contrast is provided by 1 Bruce Ackerman, We the People: Foundations 34-57 (1991). Ackerman urges courts to "synthesize" constitutional moments; thus the meaning of the equality principle in the late twentieth century comes from an understanding of the relationship between the Civil War and the New Deal. See id. Doubtless ideas of the sort urged by Ackerman help account for some aspects of Supreme Court decisions, and the theoretical underpinnings of large-scale social developments do have an impact on constitutional law. But thus far Ackerman has not discussed the weaknesses of the judiciary in thinking in such abstract terms, and an understanding of those weaknesses must play a role in any evaluation of the idea that courts are to synthesize constitutional moments. At least most of the time, constitutional law is narrower, shallower, more incremental, and based on analogies.

n27. See Adkins v. Children's Hosp., 261 U.S. 525, 545-46 (1923); Lochner v. New York, 198 U.S. 45, 53 (1905). Consult Richard A. Epstein, Takings (1985), for a modern statement and defense.

n28. See Roe v. Wade, 410 U.S. 113, 153-54 (1973); Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965).

n29. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 766-70 (1976); Buckley v. Valeo, 424 U.S. 1, 143-44 (1976) (per curiam).

n30. See Dworkin, supra note 3, at 10-11.

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The fourth response characterizes one understanding of the Warren Court era. n31 It is represented by the most famous footnote in all of constitutional law: footnote four in the Carolene Products case. n32 On this view, the Court

should act to improve the democratic character of the political process itself. It should do so by protecting rights that are preconditions for a well-functioning democracy, and by protecting groups that are at special risk because the democratic process is not democratic enough. Insofar as it stressed the need to protect political outsiders from political insiders, McCulloch v. Maryland n33 is probably the earliest statement of the basic position; more recent examples include Baker v. Carr, n34 Reynolds v. Sims, n35 and Shaw v. Hunt. n36 This conception of the judicial role, defended by John Hart Ely, n37 is based on the notion of democracy-reinforcement.

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n31. See John Hart Ely, Democracy and Distrust 4-7 (1980).

n32. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

n33. 17 U.S. (4 Wheat.) 316 (1819).

n34. 369 U.S. 186 (1962).

n35. 377 U.S. 533 (1964).

n36. 116 S. Ct. 1894 (1996).

n37. See Ely, supra note 31, at 4-5. A variation on the same theme can be found in Habermas, cited above in note 3, at 261-86.

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As an institution, the Supreme Court has not made an official choice among these four approaches. Even individual Supreme Court Justices can be hard to classify. Consider the current Court. Justices Scalia and Thomas are outspokenly originalist, n38 and certainly neither can fairly be accused of rampant inconsistency. But in last Term's 44 Liquormart case, Justice Thomas interpreted the First Amendment with little reference to history. Indeed his opinion looked like a form of independent interpretive argument. Justice Scalia's views on campaign finance regulation and affirmative action do not appear to result from extended historical inquiry. n39 Chief Justice Rehnquist has often endorsed the rule of clear mistake, and he is probably the most consistent proponent of this view in recent decades. But in cases involving affirmative action, n40 the Chief Justice speaks in quite different terms; here his method is more like a form of independent interpretive judgment.

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n38. See supra note 19.

n39. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in the judgment).

n40. Note Chief Justice Rehnquist's votes against the constitutionality of affirmative action programs in, for example, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476 (1989); Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 657 (1987); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269 (1986).

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No one need be charged with hypocrisy here. Perhaps different constitutional provisions are best treated differently. Thus the rule of clear mistake might make sense for the Due Process Clause, whereas the idea of democracy-reinforcement is appropriate for the First Amendment and the Equal Protection Clause. Indeed, the idea of democracy-reinforcement creates a great deal of space for the rule of clear mistake in those cases in which no democratic defect is at stake. n41 Or the Court might adopt a presumption in favor of originalism but look elsewhere when history reveals gaps or ambiguities. n42

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n41. The Carolene Products Court thought that Carolene Products was itself such a case. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). But see Geoffrey P. Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397 (arguing against Carolene Products).

n42. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and concurring in the judgment) (writing that the absence of developed historical evidence compels him to follow existing precedent).

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B. Against Theories, Against Rules

To resolve these abstract debates, a judge must take a position on some large-scale controversies about the legitimate role of the Supreme Court in the constitutional order. But let us notice a remarkable fact. Not only has the Court as a whole refused to choose among the four positions, or to sort out their relations, but many of the current justices have refused to do so in their individual capacities. Consider Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. These Justices - the analytical heart of the current Court - have adopted no "theory" of constitutional interpretation. It is not even clear that any of them has rejected any of the four approaches I have described. The most that can be said is that none of the Justices is an originalist in the sense of Justices Scalia and Thomas, and that none of them believes that any of these approaches adequately captures the whole of constitutional law.

In their different ways, each of these justices tends to be minimalist. I understand this term to refer to judges who seek to avoid broad rules and abstract theories, n43 and attempt to focus their attention only on what is necessary to decide particular cases. Minimalists emphatically believe in reason-giving, but they do not like to work deductively; they do not see ' outcomes as reflecting rules or theories laid down in advance. They also tend to think analogically and by close reference to actual and hypothetical cases. I believe (though I cannot [*15] prove) that all of the justices named above understand themselves as minimalists in this sense, and that they have chosen to be minimalist for reasons that are, broadly speaking, of the sort discussed here.

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n43. There are intrapersonal parallels, quite outside the context of law. Sometimes people try to make narrow and shallow decisions in personal matters and to leave the broader and more deeply theoretical questions for another day. See Edna Ullmann-Margalit, Opting, in The 1985 Yearbook of the Wissenschaftskelleg zu Berlin (discussing this phenomenon). Sometimes people try to leave things undecided because they seek to avoid the responsibility of decision or because they know that any decision, even the right decision, will cause injury to self or others. A great deal of work remains to be done on this important topic.

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Minimalism contrasts with maximalism, understood as an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes. At the opposite pole from maximalism is reasonlessness, as in a denial of certiorari, and close to reasonlessness is what might be called "subminimalism," found in decisions that are conclusory and opaque, and that offer little in the way of justification or guidance for the future. It is possible to imagine a rough continuum of this sort:

reasonlessness/silence - >subminimalism - >minimalism - >ambitiousness - >maximalism (complete rules/full theoretical grounding)

Of course, there can be much dispute over what is necessary to defend a decision. Maximalists might argue that minimalists consistently say less than necessary precisely because they avoid the full range of relevant theoretical arguments and the full range of hypothetical cases. n44 Minimalists, by contrast, seek to deal only with the closest of precedents and the most obvious of hypotheticals; they avoid dicta; they try to find grounds on which people can converge from diverse theoretical positions. Let me explain these ideas in more detail.

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n44. This can be understood as the thrust of Ronald Dworkin, Law's Empire 5-30, 219-24 (1985).

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C. Narrow Rather Than Wide

Minimalists try to decide cases rather than to set down broad rules; they ask that decisions be narrow rather than wide. They decide the case at hand; they do not decide other cases too unless they are forced to do so (except to the extent that one decision necessarily bears on other cases). n45 Of course, narrowness is relative, not absolute. A decision that discrimination against the mentally retarded will face rational basis review n46 is narrow compared to a decision that discrimination on all grounds other than race will face rational basis

review. But it is broad compared to a decision that holds for or against the mentally retarded without announcing a standard of review. Of course, narrowness may run into difficulty if it means that similarly situated people are being treated differently; this very fact can press the Court in the direction of breadth. n47

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n45. For an especially illuminating discussion, see Joseph Raz, The Relevance of Coherence, in Ethics in the Public Domain 261, 279-303 (1994).

n46. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

n47. Cf. Dworkin, supra note 44, at 219-24 (1985) (discussing consistency).

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Currently, there is by no means a consensus that minimalism is the appropriate way for a court to proceed. Justice Scalia, for example, is [*16] no minimalist. n48 On the contrary, he is close to a maximalist, sharply opposing self-consciously narrow decisions. Justice Scalia has prominently argued that courts should create rules, because rulelessness violates rule of law values. n49 There is much force to his argument. It would be foolish to be a thoroughgoing minimalist; the case for breadth is strong in too many cases. n50 Indeed, the Supreme Court grants certiorari only when the issue has a high degree of national importance, so that the decision in the case at hand will affect other cases too. n51

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n48. Although Justice Scalia favors applying rules to subsequent cases, this preference is part of his maximalism, that is his effort to prevent highly particularistic, case-by-case judgments. Interestingly, Justice Scalia does not appear to believe in rigid principles of stare decisis. See, e.g., United States v. Virginia, 116 S. Ct. 2264, 2292-93 (1996) (Scalia, J., dissenting) (questioning much of the law of equal protection); Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (arguing in favor of overruling Roe v. Wade, 410 U.S. 113 (1973)). Justice Thomas may be the most consistent maximalist on the Court. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (advocating the abandonment of the "commercial speech/political speech" distinction).

n49. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1187 (1989). Rule of law values include predictability, control of official discretion, and minimization of arbitrariness.

n50. See infra pp. 28-33.

n51. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice 165-67 (7th ed. 1993).

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But this is only part of the story. n52 Judges who refuse to set down broad rules can minimize both the burdens of making decisions and the dangers of erroneous decisions. Perhaps the Court will set out a rule that is wrong as applied to other cases not before the Court; n53 perhaps it would be too time-consuming and difficult to generate a decent rule. Hence it is best to decide the case on the narrowest possible ground. This idea is closely associated with the ban on advisory opinions, a ban that promotes minimalist goals by leaving things undecided and greatly reducing the occasions for judicial judgment.

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n52. Justice Scalia himself seems to recognize this point. See Scalia, supra note 49, at 1186-89.

n53. The need for caution is one of the central arguments of Justices Breyer and Souter in Denver Area Educational Telecommunications Consortium, Inc. v. FCC. See 116 S. Ct. 2374, 2388-89 (1996) (opinion of Breyer, J.); id. at 2402-03 (Souter, J., concurring).

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As a first approximation, we might try to systematize the inquiry and the resulting disputes in the following way: good judges try to minimize the sum of decision costs and error costs.

1. Decisions and Decision Costs. - Decision costs are the costs of reaching judgments. Human beings incur these costs in all contexts, and they adopt a range of devices to reduce them. n54 In the legal setting, decision costs are faced by both litigants and courts. If, for example, a judge in a case involving the "right to die" attempted to generate a rule that would cover all imaginable situations in which [*17] that right might exist, it is likely that the case would take a very long time to decide. Perhaps these costs would be prohibitive. The high costs might arise from a sheer lack of information, or because of the pressures faced by a multi-member court consisting of people who are unsure or in disagreement about a range of subjects. Such a court may have a great deal of difficulty in reaching closure on broad rules. Undoubtedly, the narrowness of many decisions is a product of this practical fact. Romer v. Evans, failing to mention Bowers v. Hardwick n55 and otherwise leaving things undecided, is a recent example; the opinion may well be a product of the difficulty of achieving consensus among six diverse Justices. It is important to distinguish between cases in which minimalism is a practical necessity and those in which minimalism is affirmatively desirable because it reflects a court's appropriate modesty about its own capacity.

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n54. See John Conlisk, Why Bounded Rationality?, 34 J. Econ. Literature 669, 682-83 (1996) (discussing heuristics and other techniques).

n55. 478 U.S. 186 (1986).

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Quite apart from the pressures of inadequate information and internal disagreement, minimalism might make special sense when circumstances will change in large and relevant ways in the near future. n56 Facts and values can go in unanticipated directions, thus rendering anachronistic a rule that is well-suited to present conditions. n57

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n56. I am focusing here on the use of minimalism to reduce decision costs, but there are other strategies. Courts might, for example, rely on presumptions to say that, in the face of uncertainty, a case will be resolved favorably to one or another side.

n57. See Denver Area, 116 S. Ct. at 2402 (Souter, J., concurring) ("Because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

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All of these points suggest that minimalism may be desirable because of the high costs of decision. But an inquiry into decision costs will not always support minimalism. A court that economizes on decision costs for itself may in the process "export" decision costs to other people, including litigants and judges in subsequent cases who must give content to the law. The aggregate decision costs associated with the court's narrow decision could be very high. When law is uncertain, decision costs can proliferate, as people invest in activities designed both to find out the content of law and to press the law's content in certain directions. n58 High decision costs are especially pernicious when planning is important; it is for this reason that stare decisis and broad rules are extremely valuable in cases involving the need to plan. n59

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n58. See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 564 (1992).

n59. The Supreme Court made a controversial statement to this effect in Payne v. Tennessee, 501 U.S. 808, 827-30 (1991).

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There is one group of people who will predictably do well when decision costs are high: lawyers. But high decision costs can be a [*18] disaster from the standpoint of society as a whole. It is probably for this reason that the ban on advisory opinions is relaxed in cases when uncertainty impedes necessary planning. n60

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n60. Cf. William M. Landes & Richard A. Posner, The Economics of Anticipatory Adjudication, 23 J. Legal Stud. 683, 710-13 (1994) (describing the usefulness of advisory opinions in reducing the costs of legal errors).

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2. Errors and Error Costs. - Error costs are the costs of mistaken judgments as they affect the social and legal system as a whole. It is possible, for example, that any decision involving the application of the First Amendment to new communications technologies, including the Internet, should be narrow, n61 because a broad decision rendered at this time would be likely to go wrong. A more evolutionary approach, involving the accretion of case-by-case judgments, could produce fewer mistakes on balance, because each decision would be appropriately informed by an understanding of particular facts. Lack of information is thus a crucial argument for decisional minimalism. Changed circumstances argue in the same direction; imagine the difficulties of designing good rules for a changing telecommunications market. n62 The common law process prizes minimalism partly in order to reduce the error costs associated with incomplete information and changing circumstances; analogical reasoning, as distinct from rule-bound judgment, is a crucial part of the process. n63

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n61. See Denver Area, 116 S. Ct. at 2402-03 (Souter, J., concurring); Lawrence Lessig, The Path of Cyberlaw, 104 Yale L.J. 1743, 1744-45 (1995).

n62. Some of these difficulties might, however, be reduced with rules that allow private adaptation. See Richard A. Epstein, Simple Rules for a Complex World passim (1995); Cass R. Sunstein, Problems With Rules, 83 Cal. L. Rev. 953, 1016-20 (1995).

n63. See Denver Area, 116 S. Ct. at 2386-87 (opinion of Breyer, J.); id. at 2402 (Souter, J., concurring).

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On the other hand, a broad rule, even if over-inclusive or under-inclusive, may be better than a narrow judgment, because lower courts and subsequent cases would generate an even higher rate of error. Perhaps a broad rule would be privately adaptable and thus allow adjustments across circumstances, as in the basic rules of contract and tort. n64 Perhaps a refusal to issue rules now would seem "wise" or "prudent" but leave subsequent judgments to district courts whose decisions cannot be entirely trusted. Perhaps a maximalist Court can later change the rules if the rules turn out to be wrong. In this light it would be foolish to suggest that minimalism is generally a good strategy, or that minimalism is generally a blunder. Everything depends on contextual considerations. n65 The only point that is clear even in the abstract is that sometimes the minimalist approach is the best way to minimize the sum of error costs and decision costs, because the costs of producing even a plausibly accurate rule can be prohibitive. What [*19] seems especially important is that with an appreciation of this point, we can see links among seemingly disparate ideas and debates: the ban on advisory opinions, the rules-standards debate, the use of the passive virtues, the decision whether and when to grant certiorari, the question whether to rule broadly or narrowly, and the use of "clear statement" principles in statutory construction.

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n64. See Epstein, supra note 62, at xii-xiii, 307-12; Sunstein, supra note 62, at 972-75.

n65. See Frederick Schauer, Playing by the Rules 157 (1991).

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3. Metrics. - We can find these ideas useful without understanding the idea of "costs" in a fully economistic manner. The various consequences of decisions or errors cannot easily be monetized or aligned along a single metric. Decision costs are qualitatively different from error costs, and the ingredients of both are qualitatively distinct. Consider the risk that a certain rule in constitutional law will produce excessive restrictions on political speech. This risk may be less well understood if we see it as a "cost" like all other costs. It is valuable to think about minimizing the sum of decision costs and error costs, but we should not proceed as if these various costs are qualitatively indistinguishable, or as if there is some metric along which they can be assessed.

4. Democracy. - One of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems. n66

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n66. Insofar as the minimalist project stresses this goal, it is continuous with the post-New Deal, neo-Thayerian effort to limit the role of judges in political processes and forms part of the project of Justices Brandeis and Frankfurter. See Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1447-52 (1988). This effort was democracy-permitting. But as I will suggest, certain forms of minimalism that I mean to approve here are democracy-forcing, and in that way continuous with Carolene Products footnote four, rather than with the Thayer-Brandeis-Frankfurter strand of constitutional law. And as noted above, some minimalists attempt to avoid theoretical disputes of this kind.

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Suppose, to return to our example, that the Supreme Court is asked to decide whether a certain attempt to regulate the Internet violates the First Amendment. This claim raises complex issues of value and fact, and it is important for the Court to have some information on both values and facts before it lays down a broad rule. A narrow decision, pointing to a range of factors in a particular case, is a way of allowing some breathing space for participants in the democratic process. n67 Similarly, the Court might (if it can) strike down a law as unconstitutionally vague and in the process refuse to decide exactly how much regulation would be acceptable under a sufficiently clear law. As another example, suppose that the Court is asked to hold that the Equal Protection Clause requires states to recognize same-sex mar- [*20] riages. The Court might want to leave that issue undecided not only because it 1) cannot reach a consensus or 2) lacks relevant information, but also because it 3) is unsure about the (legally relevant) moral commitments, 4) thinks that people have a right to decide this issue democratically, or 5) believes that a judicial ruling could face intense political opposition in a way that would be

counterproductive to the very moral and political claims that it is being asked to endorse.

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n67. See, e.g., Denver Area, 116 S. Ct. at 2385-86. Of course there are many different conceptions of democracy, and the word itself cannot justify deference to majorities. See Dworkin, supra note 3, at 15-20; Gutmann & Thompson, supra note 3, at 27-33.

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In sum, minimalism can promote democracy because it allows democratic processes room to maneuver. Judges should allow such room because their judgments might be wrong and, even if right, their judgments may be counterproductive.

This democratic argument helps explain some prominent objections to Roe v. Wade n68 as it was originally written. In the Court's first confrontation with the abortion issue, it laid down a set of rules for legislatures to follow. The Court decided too many issues too quickly. n69 The Court should have allowed the democratic processes of the states to adapt and to generate sensible solutions that might not occur to a set of judges. n70 In this way, the democratic argument for minimalism invokes the need for prudence, social adaptation over time, and humility in the face of limited judicial capacities and competence.

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n68. 410 U.S. 113 (1973).

n69. See Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 385-86 (1985).

n70. See Mary Ann Glendon, Abortion and Divorce in Western Law 48-51 (1987).

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D. Shallow Rather Than Deep

In addition to deciding the cases at hand narrowly, minimalists generally try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements. n71 Such agreements may involve either particulars or abstractions. Participants in public life may thus unite behind a particular outcome when they disagree on abstractions, or they may accept an abstraction when they disagree on particular outcomes. The latter strategy is dominant in constitution-making, as people accept the principles of "freedom of speech" or "equality" despite their uncertainty or disagreements about what these principles specifically entail. In a parallel process, judges may adopt a standard in the form of a "reasonableness" test n72 instead of deciding on the appropriate rule.

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n71. For a more detailed treatment of this idea, see Cass R. Sunstein, Legal Reasoning and Political Conflict 35-61 (1996).

n72. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996).

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Here I emphasize the possibility of concrete judgments backed by unambitious reasoning on which people can converge from diverse foundations. Judges who disagree or who are unsure about the foundations of constitutional rights, or about appropriate constitutional [*21] method, might well be able to agree on how particular cases should be handled. For example, they might think that whatever they believe about the most complex free speech issues, a state cannot ban people from engaging in acts of political protest unless there is a clear and present danger. Thus judges who have different accounts of what the Equal Protection Clause is all about can agree on a wide range of specific cases. There can be little doubt, for example, that the Justices who joined the Court's opinion in Romer v. Evans did so from different theoretical perspectives. Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles. Avoidance of such principles helps enable diverse people to live together - thus creating a kind of modus vivendi - and also shows a form of reciprocity or mutual respect.

Incompletely theorized agreements are by no means unaccompanied by reasons. On the contrary, judicial decisions infrequently resolve foundational questions, and they are nonetheless exercises in reason-giving. Recall that minimalism is an effort to decide cases with the least amount necessary to justify the decision. Reasoned but theoretically unambitious accounts are an important part of that effort. Of course it is true that people sometimes hold to their commitments to particular cases more tenaciously than they hold to their theories. Sometimes it is the particular judgments that operate as "fixed points" for analysis. All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf.

In this way, minimalists try to make decisions shallow rather than deep. n73 They avoid foundational issues if and to the extent that they can. By so doing the Court can both model and promote a crucial goal of a liberal political system: to make it possible for people to agree when agreement is necessary, and to make it unnecessary for people to agree when agreement is impossible. Judicial minimalism is well-suited to this goal.

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n73. Like narrowness, shallowness is a matter of degree. The clear and present danger test is shallow compared to a judgment that the First Amendment is rooted in a conception of autonomy. But it is deep compared to a judgment that, whatever the appropriate test, a political protest by members of the Ku Klux Klan is protected by the First Amendment.

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E. Kadi Justice and Anglo-American Analogues

Reasons are by their nature abstractions. n74 Any reason is by its nature more abstract than the case for which it is designed, and any [*22] reason, if

it is binding, will extend beyond that case. n75 From this point we can imagine the most extreme legal system: all judgments are unaccompanied by reasons, and no judgment has stare decisis effects. In such a system, the costs of decision would be quite low. In such a system, the error costs may be high if subsequent courts go wrong, but at least we can see that the decision in one case cannot possibly produce errors in subsequent cases.

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n74. See Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 635, 665 (1995).

n75. For a discussion of reasons and decisions from the standpoint of social psychology, with interesting implications for law, see Eldar Shafir, Itamar Simonson & Amos Tversky, Reason-Based Choice, 49 Cognition 11 (1993).

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An extreme system of this sort - what Max Weber called "Kadi justice" n76 - would undoubtedly seem a kind of bizarre nightmare world, the stuff of Kafka, Orwell, science fiction, Mao's China. But the idea is not as unfamiliar to American law as it may seem, for there are important contexts in which a decision or an agreement is unaccompanied by any rationale at all. n77 This is typically a jury's practice in giving a verdict. It is also the Court's usual n78 practice when denying certiorari. Denials are reasonless. They are entirely rule-free and untheorized. Outcomes unaccompanied by reasons do not foreclose different outcomes in other cases. They also take relatively less time to produce, since it can be far easier to come up with a decision than to come up with an explanation. This is one reason for the Court's usual failure to explain its decisions to deny certiorari. An unexplained denial has a practical advantage too, since judges with divergent rationales can converge on the outcome without converging on an account. These ideas also help account for the (controversial) practices of producing unpublished opinions and of affirming lower court decisions without comment.

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n76. See Max Weber, Economy and Society: An Outline of Interpretive Sociology 976-78 (1968).

n77. See Schauer, supra note 74, at 634.

n78. See the revealing and unusual comments of Justice Ginsburg in connection with the denial of certiorari in Hopwood v. Texas, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joins). See also Hopwood v. Texas, 116 S. Ct. 2581 (1996).

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Somewhere on the continuum between minimalist decisions and reasonless decisions are those that offer a rationale that is not, on reflection, adequate to justify the outcome. Dissenting opinions, of course, always make this claim, but sometimes opinions seem so conclusory that the accusation of subminimalism has force. As we will see, this is the accusation of Justice Scalia about the Court's opinion in Romer v. Evans. n79 Opinions of this sort violate norms

associated with legal craft. If an opinion is supposed to do anything, it is supposed to explain the outcome of the case. But if outcomes unaccompanied by any reasons have social uses, then outcomes accompanied by [*23] subminimalist reasons might also have social uses. As we shall see, this is a possible response to Justice Scalia's complaint in Romer.

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n79. See 116 S. Ct. 1620, 1629-30 (1996) (Scalia, J., dissenting).

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F. Shallow and Narrow, Deep and Wide

There are many possible interactions along the dimensions of depth and width. Consider the following table:

[SEE TABLE IN ORIGINAL]

A denial of certiorari is as narrow as can be - it does not affect any other case - and it is also entirely untheorized and hence as shallow as possible. The Supreme Court's decision in Romer v. Evans can be understood as very narrow, since it does not purport to touch other possible cases, n90 and also as shallow, since its rationale need not be taken to extend much further than its holding. United States v. Lopez was emphatically both narrow and shallow. It turned on a set of factors, not on a broadly applicable rule, and it gave no deep account of federalism. n91 The same can be said of the Denver Area case, where the Court, emphatic about the complexity of new telecommunications technologies, n92 left many issues open and gave no deep account of the underlying First Amendment principles.

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n80. 116 S. Ct. 1620 (1996).

n81. 115 S. Ct. 1624 (1995).

n82. 116 S. Ct. 2374 (1996).

n83. 395 U.S. 444 (1969).

n84. 410 U.S. 113 (1973).

n85. 116 S. Ct. 1495 (1996).

n86. 116 S. Ct. 2264 (1996).

n87. 377 U.S. 533 (1964).

n88. 60 U.S. (19 How.) 393 (1857).

n89. Hercules is an idealized judge embodying Dworkin's conception of law as integrity. He is intended as a thought experiment and not as a real-world judge. See Dworkin, supra note 44, at 239-40, 264-66.

n90. See Romer, 116 S. Ct. at 1629.

n91. See United States v. Lopez, 115 S. Ct. 1624, 1630-32 (1995).

n92. See Denver Area Educ. Telecomms. Consortium v. FCC, 116 S. Ct. 2374, 2385 (1996) (opinion of Breyer, J.).

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We can also imagine decisions that are both deep and wide. Reynolds v. Sims, announcing the one-person-one-vote rule, n93 was very broad n94 and also fairly deeply theorized. The one-person-one-vote idea applied to many cases and depended on an account of political representation. Similarly, the Dred Scott case generated a broad ruling that rested on an exceptionally ambitious account of the Constitution's posture toward slavery and African-Americans. n95 For purposes of understanding legal reasoning, Ronald Dworkin has described an idealized judge, Hercules, who seeks to offer the "best substantive interpretation" of past legal practices. n96 This is Dworkin's notion of law as integrity. n97 For present purposes what is important is that Hercules is ambitious along both dimensions, attempting to make theoretically deep judgments while understanding how those judgments square with many other actual and hypothetical decisions. n98 Although real-world judges rarely seek both width and depth, it is possible to understand the claim that this is an appropriate aspiration for law. n99

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n93. See Reynolds v. Sims, 377 U.S. 533, 568-71 (1964).

n94. The decision need not have been so broad. See Reynolds, 377 U.S. at 588-89 (Stewart, J., concurring in the judgment) (agreeing with the majority's finding that the apportionment violated the Equal Protection Clause on the ground that allocation of voting authority was random and lacked the support of any intelligible principle).

n95. See infra pp. 48-49.

n96. Dworkin, supra note 44, at 225.

n97. See id. at 240.

n98. See, e.g., id. at 313-54 (exploring Hercules's application of law as integrity to statutory construction).

n99. Cf. id. at 265 (explaining that Hercules serves as an ideal judge who has the opportunity to engage in more thorough self-reflection and to aim for a more comprehensive theory of law than does an ordinary judge).

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Some judgments are shallow but wide. In Brandenburg v. Ohio, the Court adopted a form of the clear and present danger test that is very wide in the sense that it is used in a great range of cases. But the Court did not give a deep theoretical grounding for the test. It did not, for example, try to root

its test in a conception of democratic deliberation, or explore the link between the interest in autonomy and the right to free expression. n100 The same can be said about Roe v. Wade. n101 That decision was wide in the sense that it settled a range of issues relating to the abortion question. But it did not give a deep account of the foundations of the relevant right.

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n100. See Brandenburg v. Ohio, 395 U.S. 444, 444-49 (1969) (per curiam) (adopting a version of the clear and present danger test).

n101. 410 U.S. 113 (1973).

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It is hardest to imagine cases in cell 3: those that are deeply reasoned but also narrow. A deep account will in all likelihood have applications other than that before the Court. If a court says that the Equal Protection Clause is rooted in a principle involving the (constitutionally relevant) immorality of using skin color as a basis for public decisions, its [*25] decision will be wide as well as deep, or more precisely wide because deep. But we can find some examples from the 1995 Term. The plurality's opinion in 44 Liquormart may well be an example of a cell 3 decision, one that has depth without much width. There five Justices appeared to associate the First Amendment with a conception of autonomy, according to which it is illegitimate to regulate speech on the ground that people might be persuaded by it. n102 But the five Justices did not suggest that this autonomy principle would alter the law in cases not involving regulation of truthful advertising of prices. n103 An even clearer example is United States v. Virginia. There the Court was careful to limit its decision to VMI, a "unique" institution. But the Court also ventured some ambitious remarks about the nature of the equality guarantee in the context of gender. n104

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n102. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996) (plurality opinion).

n103. See id.

n104. See infra pp. 72-79.

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We are now able to see some complexities in the idea of minimalism. Suppose, for example, that the Court is asked to strike down a law regulating sexually explicit speech on the Internet on First Amendment grounds. Suppose that the Court says that the law is impermissibly vague, and in that way brackets the question whether sexually explicit speech on the Internet receives the same kind of protection as sexually explicit speech in the print media. The Court says, in other words: "We do not say exactly what speech is protected when it is found on the Internet. But this law is so unacceptably vague that it is unconstitutional whatever the standard." In an important sense, this is precisely the kind of democracy-forcing minimalism that I mean to endorse here. It is democracy-forcing because it requires legislatures to speak with clarity. It is minimalist in the sense that it leaves key questions open. But it is

nonminimalist in some crucial ways, for a vagueness doctrine may also be broad (if the vagueness constraint applies to many contexts) and deep (if the doctrine depends on an articulated account of, for example, the rule of law). It may itself be generative of many other outcomes. Some opinions are minimalist in some ways but maximalist in others. Decisions are not usually minimalist or nonminimalist; they are minimalist along certain dimensions.

G. Of Stare Decisis and Clear, Democracy-Reinforcing Backgrounds

The effect of width and depth is not merely a function of what the Court says. It will depend a great deal on the applicable theory of stare decisis. If precedents receive little respect, even a wide and deep opinion will not control future cases. The familiar distinction between holding and dicta thus has everything to do with the extent of minimalism. A legal system that insists on this distinction will drive prior cases in the direction of minimalism, whatever courts say in the [*26] initial cases. Courts that attempt to be maximalist may be quite surprised by the conduct of subsequent courts, which characterize their language as "dicta." Thus if subsequent courts have a great deal of discretion to recharacterize holdings, they can effectively turn any prior decision into a minimalist opinion. But if subsequent courts perceive themselves as bound to take precedents as they were written, minimalism will be a creation of the court that decides the case at hand. Here are some possibilities:

[SEE TABLE IN ORIGINAL]

Cell 2 contains the strongest rule-like constraints. The great transformative opinions of the New Deal era are key examples. Cell 3 is the most rule-free. Administrative adjudication sometimes has this character. Cells 1 and 4 are the most interesting. Cell 1 probably captures the most ordinary picture of Anglo-American common law; courts narrowly decide the cases presented to them, but their decisions are given enormous weight in subsequent proceedings. Cell 4 is akin to caricatures of the Warren Court. Decisions in this cell set out broad and deep pronouncements that have little weight in subsequent cases. Although this approach may seem irresponsible, it can have certain advantages in promoting planning while, at the same time, allowing change if prior decisions go wrong. Of course we can see, on the two relevant dimensions, a continuum rather than a sharp division.

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n105. 312 U.S. 100, 114-15 (1941) (upholding broad congressional powers under the Commerce Clause to regulate interstate commerce, regardless of the motive or purpose of the regulation).

n106. 304 U.S. 64, 78 (1938) (denying the existence of federal common law and holding that federal courts sitting in diversity must apply the statutory and decisional law of the forum state).

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Stare decisis has dimensions of both breadth and strength. A legal system will move in the direction of minimalism if previous (maximalist) decisions

will be abandoned when they seem plainly wrong. But it will also move in that direction if subsequent courts have flexibility to disregard justificatory language as "dicta" or to recharacterize previous holdings. A Supreme Court that is reluctant to overrule past decisions can accomplish much of the same thing through creative reinterpretation. Because courts have the power to recharacterize past decisions, they can turn originally minimalist decisions into maximalist decisions. Reed v. Reed, n107 for example, invalidated a law on grounds of sex discrimination n108 in a minimalist opinion, but subsequent courts have recharacter- [*27] ized this case as embodying a broad principle. The Court has begun to transform Shaw v. Hunt n109 in a similar way, broadening this narrowly written decision. The ultimate meaning of Romer v. Evans and United States v. Virginia - possible one-way tickets, possible seminal cases - will depend on the future.

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n107. 404 U.S. 71 (1971).

n108. See id. at 76-77.

n109. 116 S. Ct. 1894 (1996).

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More generally, courts deciding cases will have only limited authority over the subsequent reach of their opinions. A court that is determined to be maximalist may fill its opinion with broad pronouncements, but those pronouncements may subsequently appear as "dicta" and be disregarded by future courts. The converse phenomenon is also familiar. A court may write a self-consciously minimalist opinion, but subsequent courts may take the case to stand for a broad principle that covers many other cases as well.

A strong theory of stare decisis, especially in statutory cases, can create desirable incentives for participants in the democratic process. If courts do not alter their interpretation of statutes, even when their interpretation is wrong, Congress will have an especially clear background against which to work, knowing that Congress itself must correct any mistake. Thus a strong theory of stare decisis is part of a range of devices designed to create good incentives for democracy by providing a clear background for Congress. Consider the "plain meaning" rule in statutory interpretation, the refusal to consider legislative history, the unwillingness to "imply" private rights of action, and the refusal to impose constraints on jury awards of punitive damages. All of these devices can be understood as democracy-promoting, at least in aspiration.

This idea unites much of Justice Scalia's work; it provides a strong connection between his opinions and the ideal of deliberative democracy. The traditional response is that Congress's agenda is too loaded to support the view that congressional inaction, as against clear backgrounds, reflects considered judgments by Congress. On this view, more particularized judgments can lead to results that Congress would reach if it could consider every issue, or at least such judgments can give rationality and fairness the benefit of the doubt. n110 This debate is hard to resolve in the abstract, but it points to a set of tractable, largely empirical issues on which progress might be made in the future.

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n110. See generally Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1344-65 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (collecting cases on interpreting legislative silence and discussing their implications); Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Sup. Ct. Rev. 429, 438 (arguing that the institutional reality of Congress is not captured either by the view that legislative silence implies consent or by the view that the burden of making new law rests on those who propose it).

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There is a related point. The reception of a Supreme Court opinion may matter as much as the applicable theory of stare decisis. Public officials may take an opinion as settling a range of issues despite the [*28] Court's effort to proceed narrowly; or such officials may take an opinion to be narrow, or distinguishable, despite the Court's effort at breadth. A full understanding of the topic of minimalism would have to extend far outside the judicial domain to the reaction of other branches to Supreme Court decisions.

Finally, there is a large difference between, on the one hand, forming a broad and deep judgment and, on the other hand, making that judgment public. Thus far I have treated the two cases as if they were the same. But we can readily imagine a situation in which a judge, or a majority on a multimember court, has decided (whether tentatively or not) in favor of a rule or a deep justification for an outcome, but nonetheless refuses to state the rule or justification in public. Judges might be publicly silent for a variety of reasons - for example, because they are not sure that they are right, because they fear public reaction, or because no majority can be obtained in favor of a rule or deep justification.

III. The Limits of Minimalism

Reviewing speech restrictions under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring).

A. Against Minimalism

A great deal can be said against minimalist judgments. Minimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time.

As we have seen, the minimalist claims to reduce costs of decision and costs of error. The minimalist also claims to facilitate democratic deliberation in the period between the case at hand and future cases, a benefit because new

facts and perspectives may come to light. But there may well be reasons to doubt these claims. The decision costs of issuing a narrow, shallow judgment in case A may be low for the judge in that case, but lead to dramatically increased decision costs for judges in cases B though Z. n111 Thus the minimalist judge may be "exporting" costs from her own court to others. Lowered decision costs on the Supreme Court may entail huge expenditures by lawyers and judges to resolve the unanswered questions later. Consider, for example, the contexts of homosexual rights and punitive damages, in which [*29] the absence of clear standards will produce enormous complexity in subsequent cases.

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n111. See Scalia, supra note 49, at 1178-83 (criticizing judicial reliance on the "totality of the circumstances" test).

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Moreover, a narrow judgment in case A might not reduce aggregate error costs. Perhaps the Court in case A will be able to generate a rule or a decent and relatively elaborate account of its judgment. A minimalist judgment in case A might produce a range of mistakes in cases B through Z, because the lower courts will struggle unsuccessfully to make sense of case A. And if the rule in case A is a pretty good one, and if we lack confidence in the capacity of other institutions to produce a better one, we will get fewer rather than more errors through the maximalist route. This observation may help justify the rule-bound approaches of Miranda v. Arizona, n112 Miller v. California, and Roe v. Wade.

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n112. See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 196 (1988) (noting that a justification for Miranda's prophylactic rule is that the absence of clear rules creates a danger of impermissible official action and might make it difficult for a reviewing court to detect such action).

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For similar reasons, minimalism may produce unfairness through dissimilar treatment of the similarly situated. It is true that rules may be unfair if they place diverse situations under a single umbrella. But it may be even worse to allow cases to be decided by multiple district court judges thinking very differently about the problem at hand. Minimalism might also threaten rule of law values; by impeding planning it does not ensure that decisions are announced in advance. It is often more important for people to know what the law is than for the law to have any particular content. When planning is necessary, minimalism may be a large mistake. Legislatures and agencies often do and should avoid minimalism for this reason. Indeed, courts may be minimalist largely because the adversary system limits judges' information to individual controversies; if so, minimalism is something for the law to avoid if lawmakers can possibly obtain the necessary information.

The minimalist's claim to advance democratic legitimacy may also be questioned. Notwithstanding the democracy-forcing consequences of forms of minimalism discussed below, the question remains whether increased democratic capacity is always desirable. The disputed issue may be ill suited to

democratic choice, either because it should be off-limits to politics or because democratic deliberation is not functioning well. For example, well-organized interest groups might frustrate deliberative processes by taking advantage of collective action problems faced by their adversaries. n113 This phenomenon may be especially true with constitutional issues relating to punitive damages, commercial advertising, and homosexual rights; in all these contexts, powerful groups may be producing unreasonable legislation or blocking desirable [*30] change. And if we are concerned only about the substance - about getting things right - minimalism may be a mistake; it is possible that participants in democratic processes will merely stumble their way toward the rule that courts could have adopted long ago, in some instances never arriving at the correct rule at all. The argument that minimalism is preferable when it promotes democratic deliberation is weakened if the deliberative process delays realization of desirable rules, or precludes those rules altogether.

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n113. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice 36-37, 72 (1991).

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It seems clear that we cannot decide in the abstract whether and how much minimalism is appropriate. The choice between minimalism and the alternatives depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors. We could be confident in rejecting minimalism if the Supreme Court were excellent at developing both rules and theories, and if lower courts and other officials were very poor at both. Similarly, if democratic processes were not deliberative and failed at compiling and using information, the courts might be less reluctant to intrude into them. On the other hand, minimalism would be the right course if the Court were generally error-prone, and other institutions, deciding what the Court leaves undecided, were much better. But none of these general conclusions can claim much support. We need to answer more particular questions.

B. When Minimalism? When Maximalism?

From these observations we cannot come up with an algorithm to decide when minimalism makes sense, but some generalizations may be helpful. Anglo-American judges usually speak as if minimalism is the appropriate presumption, and of course if minimalism is the only possible route for a multimember tribunal, then minimalism will be inevitable. Minimalism becomes more attractive if judges are proceeding in the midst of factual or (constitutionally relevant) moral uncertainty and rapidly changing circumstances, if any solution seems likely to be confounded by future cases, or if the need for advance planning is not insistent. But the argument for a broad and deep solution becomes stronger if diverse judges have considerable confidence in the merits of that solution, if the solution can reduce costly uncertainty for other branches, future courts, and litigants (and hence decision costs would otherwise be high), or if advance planning is important. An inquiry of this kind can help us to assess decision costs and error costs in an intuitive way.

In any event, the case for minimalism is not separable from an evaluation of underlying substantive controversies. If judges are rightly convinced that same-sex schools always violate the Constitution, there will be little problem with a broad and deep judicial judgment to this effect. The cautious approach in United States v. [*31] Virginia is more sensible if judges believe that same-sex schools may well be constitutional when they promote equal opportunity and educational diversity. If we examine the considerations referred to above, it is at least reasonable to think, for example, that Roe was a blunder insofar as it resolved so much so quickly; that Loving v. Virginia was wrong insofar as it rested on substantive due process as an alternative ground to the (sufficient and correct) equal protection holding; and that Brown v. Board of Education was right because it was hardly the Court's first encounter with the problem and the Court could have great confidence in its judgment.

Justice Breyer's opinion in Denver Area Educational Telecommunications Consortium, Inc. v. FCC n114 is a helpful illustration. One of the issues on which the Court split was whether Congress could (through section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992) grant cable operators "permission" to exclude indecent programming from the airwaves. Justice Thomas would have resolved this issue via simple rule: because the relevant First Amendment rights are those of the operators, of course Congress could do this; Congress was merely giving operators permission that they would have had without government regulation. n115 Justice Kennedy also urged a simple rule: strict scrutiny should apply to any content-based law, and section 10(a) should be invalidated. n116 The issue was tricky, and both of these approaches seem unsatisfactory. Even if Justice Thomas's premise is correct, it does not follow that any content-based permission is constitutionally acceptable: if Congress had granted cable operators the authority to exclude programming critical of the Congress, it would have been acting unconstitutionally. And contrary to Justice Kennedy's apparent suggestion, some content-based measures are unobjectionable; imagine a law that gives a bonus of some kind to educational programming. Instead of adopting any simple rules, Justice Breyer emphasized a set of factors. n117 The regulation was based on content but not on viewpoint. It was designed to protect children, an important interest. It was reminiscent of a regulation banning indecent material that the Court upheld in FCC v. Pacifica Foundation, n118 and thus was supported by an analogy. The regulation was permissive rather than mandatory. In any case it was relevant, even if not decisive, that without a regulatory system, programmers would have no guaranteed access to the operators' systems. n119

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n114. 116 S. Ct. 2374 (1996).

n115. See id. at 2424-25 (Thomas, J., concurring in the judgment in part and dissenting in part).

n116. See id. at 2404-05 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

n117. See 116 S. Ct. at 2386-87.

n118. 438 U.S. 726 (1978).

n119. Strictly speaking this point is false. Some regulatory system is necessary to create property rights. Without a regulatory system of some kind, operators would have no right to exclude anyone. As stated, Justice Breyer's point is off the mark, and for this reason Justice Thomas's opinion is especially confused; operators have no natural or pre-legal right to exclude anyone from cable programming. Any right of exclusion is a creation of law.

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[*32]

Thus Justice Breyer avoided any rule and proceeded via a somewhat unruly set of factors. Was this a mistake? The answer depends largely on whether the Court could have confidence in a more rule-bound opinion; such an opinion could conceivably have lower aggregate decision costs (because it would leave less uncertainty for future judges) and much lower error costs (because future judges would be left with less room to make mistakes and the rule-bound opinion would be by hypothesis pretty good), while at the same time promoting planning, as Justice Kennedy indicated. n120 But Justice Breyer's position was quite reasonable. This is not an area where an absence of a clear rule seriously interferes with private planning; it is not as if the fundamental rules of contract and property are unclear. Some uncertainty at the margins about constitutional requirements is not likely to be devastating to cable operators and to lawmakers grappling with novel issues. In any case, regulation of "indecent" programming in the new electronic media raises issues for which old analogies may be treacherous. n121 Rapid change in technology may produce less restrictive alternatives than a total ban, such as parental screening devices. In addition, we may soon have more information on how children are being affected by programming. It is sensible to think that the Court should at this early stage be cautious about possible rules.

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n120. See Denver Area, 116 S. Ct. at 2406 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

n121. See Lessig, supra note 61, at 1752-55.

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But let me venture a more general hypothesis. The case for minimalism is especially strong if the area involves a highly contentious question that is currently receiving sustained democratic attention. In such areas, courts should be aware that even if they rely on their deepest convictions, they may make mistakes; n122 Dred Scott and Lochner are simply the most famous illustrations. A mistake of this kind is hardly innocuous. As the two illustrations suggest, its consequences could be disastrous and hard to correct. Even if the question is not one of constitutionally relevant morality, it may involve informational deficits that should prompt the Court to proceed incrementally.

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n122. I am speaking here against maximalist invalidations; maximalist validations, of the sort frequently favored by Justice Scalia, raise distinctive issues, partly because they are intended to spur democracy (as in the context of punitive damages). See supra pp. 26-27.

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Of course the Court's resolution may be right, in the sense that the Court identifies the just result. But democratic self-government is one of the rights to which people are entitled, and unless the democratic process is not functioning well, judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over an [*33] other. And even if the Court's resolution is right, things may go badly wrong. The Court may not produce social reform even when it seeks to do so. n123 It may instead activate forces of opposition and demobilize the political actors that it favors. n124 It may produce an intense social backlash, in the process delegitimating both the Court and the cause it favors. More modestly, it may hinder social deliberation, learning, compromise, and moral evolution over time. n125 A cautious course - refusal to hear cases, invalidation on narrow grounds, democracy-forcing rulings - will not impair this deliberative process and should improve it.

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n123. See Rosenberg, supra note 8, at 336-43.

n124. This happened in the abortion context. See id. at 185-202.

n125. See, e.g., Glendon, supra note 70, at 24-50 (comparing the American and West German experiences over abortion as an illustration of this hindering effect).

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These observations describe possibilities, or at most probabilities, and not by any means certainties. We can imagine cases in which one side in a moral debate is so palpably right from the constitutional point of view that the Court properly takes sides. We can imagine cases in which the Court is entitled to have confidence in its own account. The interest in democratic deliberation may itself push the Court away from minimalism and inspire the Court to decide highly contentious issues, n126 perhaps even more issues than it must. But such cases are rare. It is notable that the "official story" of Anglo-American adjudication is a minimalist one, n127 though the courts' actual practice is more complex, embodying, roughly speaking, a rebuttable presumption in favor of minimalism. The notion of a rebuttable presumption is cruder and less fine-grained than the inquiry I have suggested here; but it is a useful way of simplifying that inquiry and orienting judicial attitudes in light of the limited place of courts in a democratic constitutional order. A presumption in favor of minimalism might be rebutted when planning calls for breadth or depth, n128 when democracy is functioning poorly, or when a court is entitled to special confidence in its judgment. n129

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n126. See, e.g., Brandenberg v. Ohio, 395 U.S. 444, 447-49 (1968) (holding that an Ohio statute, which prohibited advocacy or assembly for the purpose of advocacy of lawless actions, was unconstitutional under the First and Fourteenth Amendments, and reversing the conviction of a Ku Klux Klan group leader under that statute).

n127. See Edward H. Levi, An Introduction to Legal Reasoning 3-8 (1948).

n128. See Landes & Posner, supra note 60, passim.

n129. Possible examples include Brown, see infra pp. 50-51, and United States v. Virginia, along the dimension of depth, see infra pp. 75-79. The examples show that it is not possible to separate an assessment of minimalism from an assessment of the underlying substantive issues.

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IV. The Place of Minimalism in Legal Culture

Mr. James' philosophy took shape as a deliberate protest against the monisms that reduced everything to parts of one embracing whole ... [*34] His was the task of preserving ... respect for the humble particular ... against the pretentious rational formula.

John Dewey, William James,
69 Independent 533 (1910). n130

We address specifically and only an educational opportunity recognized ... as "unique,' ... an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college.

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n130. Reprinted in 6 John Dewey: The Middle Works, 1899-1924, at 91, 95 (Jo Ann Boydston ed., 1978).

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United States v. Virginia,
116 S. Ct. 2264, 2276 n.7 (1996) (citation omitted).

Aware as we are of the changes taking place in the law, the technology, and the industrial structure, relating to telecommunications, ... we believe it unwise and unnecessary definitely to pick one analogy or one specific set of words now ....

We are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.

Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2385-89 (1996) (plurality opinion) (Breyer, J.).

In this Part I discuss the role of minimalism in the practice of law and in

debates over the proper outcomes of adjudication. Two points are of particular interest: the relationship between minimalism and case-by-case judgment; and the role of minimalism in making room for, and spurring, democratic deliberation.

A. Case Analysis and Analogies

It is a hallmark of legal reasoning to proceed by reference to actual and hypothetical cases. n131 In constitutional and common law, a recurring question is how the case at hand compares with those cases that have come before it. Thus constitutional law has crucial analogical dimensions; most of the important constraints on judicial discretion come not from constitutional text or history, but from the process of grappling with previous decisions. n132 This process is nonminimalist [*35] because the combined roles of stare decisis and analogical reasoning ensure that cases, once decided, will have a certain impact on the future.

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n131. See Levi, supra note 127, at 1-7; Sunstein, supra note 71, at 62-100; Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 925, 983-1017 (1996); Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 741-49, 759-67 (1993). There is a detailed literature on the role of exemplars and prototypes, and judgments of similarity, in cognition generally. See, e.g., Massimo Piattelli-Palmarini, Inevitable Illusions 147-60 (1994); Edward E. Smith, Eldar Shafir & Daniel Osherson, Similarity, Plausibility, and Judgments of Probability, 49 Cognition 67, 67-93 (1993).

n132. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 905-13 (1996).

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This process is not, however, incompatible with the fundamental project of minimalism, because it reduces the need for theory-building and for generating law from the ground up by creating a shared and relatively fixed background against which diverse judges can work. The process of case analysis also allows judges to proceed incrementally when appropriate. The distinction between holding and dicta, and the power to recharacterize holdings, give subsequent courts the discretion to hold that earlier cases, properly understood, left many issues undecided. And the process of case analysis allows greater flexibility than the process of rule-following, and in that way absorbs the minimalist's concerns about the burdens of decision, the risks of error, and the need for latitude over time and changing conditions.

Even rule-interpretation has a large element of case analysis. People frequently understand rules by reference to the prototypical or exemplary cases that the rules call to mind. n133 When the case at hand differs significantly from the prototypical or exemplary cases, the project of rule-interpretation can become very difficult, and the process of rule-interpretation in these settings may well involve analogical reasoning. For example, a recent case involved legislation imposing a mandatory minimum sentence on any person who "uses or carries" a firearm "in relation" to a drug offense. n134 In Smith v. United

States, n135 the Court held that this statute covered the sale of a firearm for drugs. n136 The Court responded affirmatively, in part because of its judgment that the use of a firearm as an object of barter raised the same problems created by the use of a firearm as a weapon. n137 In other words, the Court said that the use of the gun by Smith was relevantly similar to the use of the gun in the paradigm cases.

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n133. See Sunstein, supra note 71, at 62-100.

n134. 18 U.S.C. 924(c)(1) (1994).

n135. 508 U.S. 223 (1993).

n136. See id. at 237-38.

n137. See id. at 239.

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But another issue arose this Term in Bailey v. United States. n138 Police officers found a loaded pistol in the trunk of the defendant's car after they arrested him for possession of cocaine. n139 The circuit court held that the defendant had used the gun in relation to a drug trafficking crime. n140 The Supreme Court disagreed, holding that the statute required a demonstration of "active employment" of the firearm. n141 It supported its conclusion partly by reference to the text of the statute [*36] and its legislative history, n142 and partly by reference to an extended series of examples beginning with the obvious, defining cases of "use," and drawing lines based on analogy and disanalogy from those cases. n143 In this way, the Court gave meaning to the statutory rule by using a process similar to that of common law courts. n144

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n138. 116 S. Ct. 501 (1995).

n139. See id. at 503-04.

n140. United States v. Bailey, 36 F.3d 106, 115-18 (D.C. Cir. 1994), rev'd, 116 S. Ct. 501 (1995).

n141. See Bailey, 116 S. Ct. at 508-09.

n142. See id. at 506-08.

n143. See id. at 505-06, 508-09.

n144. The lesson extends well beyond law. Human reasoning often works by reference to prototypical cases; human beings, lacking comprehensive rationality, approach new situations by comparing them with those that come most readily to mind. Goldman notes:

The exemplar theory suggests ... that what moral learning consists in may not be (primarily) the learning of rules but the acquisition of pertinent exemplars or examples. This would accord with the observable fact that people, especially children, have an easier time assimilating the import of parables, myths, and fables than abstract principles.

Alvin I. Goldman, Ethics and Cognitive Science, 103 Ethics 337, 341 (1993); accord Gutmann & Thompson, supra note 3, at 204 ("By asking to what extent other violations of liberty resemble the paradigm cases, we seek to determine the extent to which they should count as basic and thereby enjoy the priority granted to basic liberty.").

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Case analysis has a large hold on the judicial mind partly because of the minimalism of this way of thinking. n145 Judges who rely on cases can reduce decision costs. Case analysis is generally far less time-consuming than efforts to uncover the deep foundations of various areas of law. Emphasis on cases can reduce error costs as well. A predetermined rule may not be well-suited to new circumstances, and case-by-case decisionmaking maintains flexibility for the future. Courts can distinguish past cases if they believe that these decisions are wrong as applied to new circumstances. In the abstract, it cannot be determined whether reliance on cases is better than the alternatives from the standpoint of reducing decision and error costs. We need to know about the alternatives and about the capacities of various social institutions.

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n145. Cf. Itzhak Gilboa & David Schmeidler, Case-Based Decision Theory, 110 Q.J. Econ. 605, 609-12 (1995) (discussing minimalism of case-based decisions).

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B. Minimalism and Democracy, Spurs and Prods

In discussing the connection between minimalism and democracy, we must be maximalist in an important sense, for a full understanding of minimalism cannot itself be minimalist in character. We can imagine minimalists who seek to avoid theoretical controversies of any kind; I have suggested that some minimalists try to do precisely that. But let us explore the possibility of linking certain forms of minimalism with democratic aspirations, and thus of connecting minimalism with the project of Carolene Products, broadly understood.

The American constitutional system should be understood to signal an aspiration not to aggregation of "preferences" but to a system of deliberative democracy. n146 Electoral control is an important part of [*37] the system; representatives are to be accountable to the public. But the system also places a premium on the exchange of reasons among people having different information and diverse perspectives. A heterogeneous society welcomes deliberation precisely because of that pluralism. n147 In the absence of pluralism, deliberation would not be pointless; but it would have much less of a point.

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n146. See Joseph Bessette, The Mild Voice of Reason 6-39 (1995); Gutmann & Thompson, supra note 3, at 199-229; Habermas, supra note 3, at 287-328.

n147. See Sunstein, supra note 3, at 18-25.

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Thus democracy is no mere statistical affair. It embodies a commitment to political (not economic) equality and to reason-giving in the public domain. For the deliberative democrat, political outcomes cannot be supported solely by self-interest or force. Legitimate reasons must be offered. Legislation cannot be supported on purely religious grounds, because citizens who contest the validity of those grounds do not consider them to be justificatory. n148 Nor can legislation be justified on grounds that deny the fundamental equality of human beings. n149 These constraints are part of the liberal conception of legitimacy; they embody an ideal of reciprocity, in which citizens are aware of and responsive to one another's interests and claims. n150 The relevant reasons should be offered publicly and subjected to processes of democratic deliberation.

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n148. See Lemon v. Kurtzman, 403 U.S. 602 (1971). Those who reject the controversial Lemon "test" can nevertheless endorse the ban on legislation supported solely on religious grounds; another, less stringent test could certainly lead to the same ban.

n149. See Rawls, supra note 4, at 430-31.

n150. See Gutmann & Thompson, supra note 3, at 55.

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Courts committed to deliberative democracy could support that commitment in nonminimalist ways. They could, for example, endorse some ambitious understandings of the First Amendment and the Equal Protection Clause, and use those understandings to push political processes in particular directions. They could also use rationality review to ensure that all decisions are supported by reasons of the right kind. Ideas and actions of this sort have an honorable place in American law; United States v. Virginia is the most recent example. If judges can converge on theoretically ambitious positions that are both correct (by the relevant criteria, whatever they may be) and possible to implement, it is hard to find a reasonable basis for complaint.

We can thus imagine a deeply theorized approach to judicial review, one that would call for minimalism in some areas and emphatically reject it in others. From the standpoint of deliberative democracy, however, courts should avoid foreclosing the outcomes of political deliberation if the preconditions for democratic deliberation have been met. In addition, courts should provide spurs and prods when either democracy or deliberation is absent. Some minimalist decisions reflect the Court's own desire to economize on moral disagreement, by refusing to rule off-limits certain deeply held moral [*38] commitments when it is not necessary to do so to resolve a case. Other minimalist decisions

attempt to promote democracy and deliberation. It is thus possible to distinguish among democracy-forcing, democracy-foreclosing, and democracy-permitting outcomes. To avoid foreclosure and allow democratically accountable bodies to function, a court may either decline to hear a case or rule narrowly. Such democracy-permitting outcomes are especially desirable when considerations of democracy do not themselves call for a broad ruling. This is one reason why courts should act cautiously when they are in the midst of a "political thicket." Courts know that they may be wrong; they know too that even if they are right, a broad, early ruling may have unfortunate systemic effects. It may prevent the kind of evolution, adaptation, and argumentative give-and-take that tend to accompany lasting social reform. n151

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n151. This point helps to explain the minimalism of Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (opinion of Breyer, J.), United States v. Virginia, 116 S. Ct. 2264 (1996), and Romer v. Evans, 116 S. Ct. 1620 (1996).

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In contrast, some decisions are democracy-forcing because they trigger or improve processes of democratic deliberation. A deliberative democrat may also be a maximalist in the sense that he deems an aggressive judicial posture necessary to promote the goals of deliberative democracy. Maximalism can thus be democracy-forcing. n152 But courts can also use minimalism to provide spurs and prods so as to promote democratic deliberation itself. For example,

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n152. Recall, as well, that a form of maximalism that broadly validates legislative outcomes can be urged on democratic grounds. See supra pp. 29-31.

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- A court might strike down vague laws precisely because they ensure that executive branch officers, rather than elected representatives, will set the content of the law. n153

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n153. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 168-70 (1972) (holding that an imprecise vagrancy ordinance placed too much discretion in the hands of the police).

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- A court might use the nondelegation doctrine to require legislative rather than executive judgments on certain issues. n154

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n154. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 537 (1935) (holding that the "Live Poultry Code" resulted from an unconstitutional delegation of legislative power to the executive branch).

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- A court might interpret ambiguous statutes in such a way as to keep them away from the terrain of constitutional doubt, on the theory that constitutionally troublesome judgments ought to be made by politically accountable bodies, and not by bureaucrats and administrators. n155

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n155. See, e.g., Kent v. Dulles, 357 U.S. 116, 129 (1958) (construing a statute narrowly to deny that legislative powers were delegated to the executive in the first place, while refusing to reach the constitutional issue). This "clear statement" idea is the post-New Deal version of the nondelegation doctrine; it shows that the doctrine is not really dead but is used in a more modest and targeted way to ensure that certain decisions are made by Congress rather than the executive branch.

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- A court might invoke the doctrine of desuetude to require more in the way of accountability and deliberation. n156

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n156. See infra pp. 95-96 (discussing right to die).

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- A court might require discrimination to be justified by reference to actual rather than hypothetical purposes, thus leaving open the question of whether certain justifications would be adequate if actually offered and found persuasive in politics. n157

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n157. See infra pp. 71-79 (discussing United States v. Virginia, 116 S. Ct. 2264 (1996)); see also Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977) (holding that an examination of the actual purposes behind the relevant statute contradicted the hypothetical justifications for gender-based discrimination).

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- A court might attempt to ensure that all decisions are supported by public-regarding justifications rather than by power and self-interest; it might in this way both model and police the system of public reason. n158

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n158. See Rawls, supra note 4, at 231-40.

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All of these ideas call for approaches that are at least comparatively narrow and that leave open many of the largest questions. Thus we should contrast maximalists who are deliberative democrats with minimalists who proceed from the same foundation but prefer void-for-vagueness doctrines, as applied rather than facial challenges, n159 and the like.

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n159. The debate over when statutes may be challenged "on their face" is another example of a debate about minimalism. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 609-16 (1973) (holding that where conduct is involved, a statute's overbreadth must be real and substantial before a facial challenge may be permitted).

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At this point we should notice that minimalism can interact in diverse ways with the judicial validation or invalidation of statutes. In order to understand the relation between minimalism and democracy, consider the following table: [*40]

[SEE TABLE IN ORIGINAL]

The maximum scope for democratic judgment emerges from cell 1: rule-bound decisions that broadly validate possible practices. Such decisions also have the advantage of giving a clear signal to other branches and of pressuring them to make corrections as necessary. n175 Of course from the standpoint of deliberative democracy, cell 1 outcomes may be nothing to celebrate, since the measures that are upheld may be problematic from the standpoint of deliberative democracy itself. The best defense of cell 1 involves the incentives it creates: a "clear background" against which legislatures and relevant interests can work. Thus cell 1 has been especially appealing to Justice Scalia, largely on democracy- [*41] reinforcing grounds. This argument often seems attractive, but whether cell 1 outcomes can be justified as democracy-reinforcing depends on some contextual factors: Is there a structural obstacle to democratic deliberation in the context at hand? Does the legislature's failure to respond reflect interest-group pressures, myopia, or blockages of certain kinds? Is there a constitutional commitment that broad validation overlooks? n176

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n160. 467 U.S. 229 (1984).

n161. 372 U.S. 726 (1963).

n162. 384 U.S. 436 (1966).

n163. 388 U.S. 1 (1967).

n164. 410 U.S. 113 (1973).

n165. 376 U.S. 254 (1964).

n166. 116 S. Ct. 2374 (1996).

n167. 453 U.S. 57 (1981).

n168. 323 U.S. 214 (1944).

n169. 116 S. Ct. 1620 (1996).

n170. 115 S. Ct. 1624 (1995).

n171. 357 U.S. 116 (1958).

n172. 426 U.S. 88 (1976).

n173. 473 U.S. 432 (1985).

n174. 116 S. Ct. 2264 (1996).

n175. This is an important part of Justice Ginsburg's argument in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1614-17 (1996) (Ginsburg, J., dissenting).

n176. Thus, for example, the case for a maximalist validation of punitive damage awards would be strongest if (a) it seems clear that legislatures will attend to the problem if it is a serious one, (b) the legislature's failure to attend to the problem is rightly taken to suggest that there is no problem at all, and (c) the due process clause cannot plausibly be brought to bear on extreme awards. On the other hand, a minimalist invalidation would be better if such an invalidation might spur legislative attention or if legislative inaction is a product of political blockages of some kind rather than a considered judgment on behalf of the status quo.

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Cases that fall in cell 3 leave issues undecided, but not in a way that increases democratic space as much as cell 1. This is because cell 1 cases uphold a wide range of practices, whereas cell 3 cases leave room for invalidation. From the standpoint of closing off democratic processes, maximalists are simultaneously the best and the worst - the worst because cell 2 forecloses political deliberation. Thus among current Justices, Justice Scalia is the most generous to majoritarian processes in some settings and the least generous in others, like all consistent maximalists. n177 The rules are very clear, but often democratic processes find themselves broadly foreclosed. The foreclosure may be justified; Miranda may very well have made sense in light of the difficulty of proceeding case-by-case. But the foreclosure may also cause trouble. In Loving v. Virginia, for example, the Court ruled not only that the ban on racial intermarriage violated the Equal Protection Clause but also that - in an unnecessary, contentious, and potentially confusing alternative ground - it violated substantive due process by invading a fundamental "freedom to marry." n178

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n177. Justice Black was a consistent maximalist. Compare Griswold v. Connecticut, 381 U.S. 479, 509-13 (1965) (Black, J., dissenting) (cell 1

view), with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (cell 2 view). In a similar vein, Justice Black's view that the Fourteenth Amendment includes the Bill of Rights, and nothing but the Bill of Rights, may be understood as an effort to increase the rule-bound nature of Fourteenth Amendment doctrine.

n178. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the "basic civil rights of man,' fundamental to our very existence and survival." (citation omitted)).

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In cases in cell 4, courts attempt to promote two distinct goals of a deliberative democracy: political accountability and reason-giving. The goal of accountability is fostered by ensuring that officials with the requisite political legitimacy make relevant decisions. Hence the nondelegation and void-for-vagueness doctrines ensure legislative rather than executive law-making. Attempts to prevent continued rule by old judgments "frozen" by political processes belong in the same general category. Reason-giving, a central part of political deliberation, is associated with the control of factional power and self-interested representation, the [*42] framers' dual concerns. n179 Much of administrative law consists of an effort to ensure reason-giving by agencies, partly because of a fear that they lack sufficient political accountability and may be subject to factional influences. n180 Democracy-promoting minimalism can be understood in similar terms. Thus many judge-made doctrines are an effort to ensure reason-giving, n181 and are, in the process, an effort to ensure that decisions are based upon legitimate reasons. n182 The 1994 Term's controversial minimalist decision, United States v. Lopez, n183 may be most important as a signaling device to Congress. After Lopez, Congress must focus on the fact that the national government is one of enumerated, rather than plenary, powers. As a result, Lopez is likely to play a continuing role in executive and legislative deliberations about whether there is really a need for national action.

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n179. See Sunstein, supra note 3, at 17-39.

n180. See Cass R. Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177, 185-86.

n181. We shall see such efforts being made in connection with Romer v. Evans, 116 S. Ct. 1620 (1996), and United States v. Virginia, 116 S. Ct. 2240 (1996).

n182. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414-20 (1996) (discussing judicial attempts to ensure that legitimate reasons are given in the First Amendment context).

n183. 115 S. Ct. 1624 (1995).

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C. Beyond Rules and Standards

There is an established literature on the choice between legal rules and legal standards. n184 In the familiar formulation, a rule says that no one may drive over sixty-five miles per hour; a standard says that no one may drive at an excessive speed. A rule therefore operates as a full or nearly full ex ante specification of legal outcomes. n185 A standard leaves a great deal of work to be done at the moment of application.

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n184. See, e.g., Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 passim (1974); Kaplow, supra note 58, passim; Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 passim (1992).

n185. See Kaplow, supra note 58, passim; see also Stephen McG. Bundy & Einer Elhauge, Knowledge About Legal Sanctions, 92 Mich. L. Rev. 261, 271 n.25 (1993) (setting forth some qualifications).

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This is an illuminating distinction, and often courts do choose between rules and standards. But the distinction captures only part of the picture. It is better to distinguish between minimalism and maximalism, and better yet to specify the ways in which rules and standards may fall in either camp. A standard is a good way to keep things open for the future, but things can be left undecided in other ways too. Consider, for example, a rule that has a narrow scope. Such a rule ("all people born on September 21, 1954, must obey a 55 mile-per-hour speed limit," or "Colorado's Amendment 2 is unconstitutional") does not resolve many cases. A rule unsupported by reasons [*43] may have narrow coverage. And the goal of leaving things undecided may be accomplished not via a standard or a narrow rule but by a denial of certiorari, or a holding that a case is moot. So too with a decision accompanied by reasons that are both narrow and shallow. Those reasons may take rule-like form, and yet still have a limited domain. In fact, rules generally may leave a great deal undecided. Thus a court might hold that the sixty-five mile-per-hour speed limit applies to people trying to get to an important meeting on the job, without saying whether it also applies to police officers, ambulance drivers, or people who are speeding to the nearest hospital.

The range of devices for avoiding breadth and depth is very wide. Thus the considerations that underlie the rules-standards debate - the need for predictability, the value of flexibility, limits in information, the desire to maintain space for the future - may be brought to bear on a wide range of issues not ordinarily understood in these terms.

D. True Believers and the Spirit of Liberty

Those who favor narrow decisions and incompletely theorized agreements tend to be humble about their own capacities. They are not by any means skeptics; n186 but with respect to questions of both substance and method, they are not too sure that they are right. n187 They know that their own attempts at theory may fail; they know that both law and life may outrun seemingly good rules and seemingly plausible theories. It is for this reason that many judges have not